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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

BERT L. BIRMINGHAM et al., Plaintiffs and Appellants, v. SERGIO ROLAND, Defendant and Respondent.	H041945 (Santa Clara County Super. Ct. No. CV243356)

I. INTRODUCTION

Planitiffs Bert L. Birmingham and Loretta L. Birmingham[1] are the stepfather and mother of Jeffrey Whalen, who entered into several livestock and dairy transactions with defendant Sergio Roldan. As a result of the livestock and dairy transactions, Whalen became indebted to Roldan in the amount of $60,476. The debt was secured by a recorded deed of trust on plaintiffs' property that they signed before a notary in March 2007.

In March 2013 plaintiffs filed a verified complaint against Roldan that stated two causes of action, cancellation of deed of trust and quiet title. The case proceeded to a court trial in which the court accepted Roldan's testimony that Whalen had informed him

[1] Since plaintiffs have the same surname, we will refer to them either collectively as plaintiffs or by their first names for purposes of clarity and meaning no disrespect.

that plaintiffs were going to refinance their house to get the money to pay Whalen's debt. Roldan also testified that the debt was secured by the deed of trust recorded on plaintiffs' property. A judgment in Roldan's favor was entered in December 2014.

On appeal, plaintiffs contend that the judgment should be reversed because the evidence showed that the deed of trust is invalid for several reasons, and because the trial court committed evidentiary errors. For reasons that we will explain, we find no merit in plaintiffs' contentions and we will affirm the judgment. We further find that plaintiffs' request for reversal of the postjudgment order awarding attorney's fees to Roldan is not cognizable in this appeal.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Pleadings*

Plaintiffs filed a verified complaint against defendant Roldan in March 2013. The allegations in the complaint included the following. Plaintiffs owned a home on Ortega Circle in Gilroy on which a deed of trust was recorded on March 22, 2007. The copy of the deed of trust attached to the complaint states that it was made on December 21, 2006, between plaintiffs and Roldan for the purpose of securing payment of $60,476 "according to the terms of a promissory note or notes of even date, with a maturity year of 2007 herewith made by Trustor [plaintiffs], payable to the order of Beneficiary [Roldan] . . . ."

Plaintiffs further allege that they do not recall signing either the deed of trust or the notary book of the notary who notarized the deed of trust, and they have never owed any money to Roldan. They only recall going to Roldan's real estate office and signing papers for a credit check. The deed of trust was discovered in approximately November 2012 when a preliminary title report was ordered in connection with plaintiffs' attempt to refinance their Ortega Circle property. Based on these and other

allegations, plaintiffs asserted causes of action for cancellation of deed of trust[2] and quiet title.

Roldan filed a verified answer to the complaint. He admitted that he "did not loan any money to Plaintiffs, nor did Plaintiffs receive any money directly from [him]." Additionally, Roldan asserted that "Plaintiffs' son, Jeff Whalen, secured and delivered the deed of trust that is the subject of Plaintiffs' Complaint from Plaintiffs. [Roldan] further asserts that the deed of trust was signed by Plaintiffs to secure repayment of a debt owed to [Roldan] by Jeff Whalen. [Roldan] was told by Jeff Whalen that Plaintiffs were going to refinance their property in late 2006 or early 2007 and pay [Roldan] the money owed to him by Jeff Whalen. The refinance did not occur, according to Jeff Whalen, because the money was needed to pay Jeff Whalen's bond. It was at that time that it was agreed that the deed of trust would be placed on Plaintiffs' property to secure repayment of Mr. Whalen's debt to [Roldan]."

B. *Court Trial*

The matter proceeded to a court trial in May 2014. We provide a brief summary of the trial testimony and the documentary evidence admitted at the time of trial.

Loretta, age 71, is employed as a cosmetologist. Bert, also age 71, works as a welder. They have owned a home on Ortega Circle since 1976. Whalen is the son of Loretta and the stepson of Bert. Whalen's occupation is dairy farmer and he also engages in the purchase and sale of livestock.

Roldan was licensed as a real estate salesperson in 2003 and as a real estate broker in 2007. In 2006, Roldan rented property that he owned on Berlin Drive in San Martin to Whalen and his girlfriend. Roldan and Whalen also entered into business ventures

[2] Civil Code section 3412 provides: "A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled."

together in March 2006. Roldan gave Whalen $25,000 to purchase cattle and invested $30,000 in Whalen's dairy business, with the milk profits to be split. Roldan also authorized Whalen to sell Roldan's sheep to a buyer for $400 a head and helped him load the sheep for delivery. Whalen never gave Roldan the buyer's payment for the sheep.

Sometime before April 2006 a meeting took place between Loretta, Whalen, and Roldan at Roldan's house. The purpose of the meeting was to determine if Loretta could assist Whalen and his girlfriend with the purchase of Roldan's Berlin Drive property and to check Loretta's credit. Plaintiffs had a second meeting before April 2006 with Roldan at Roldan's office for the purpose of checking plaintiffs' credit as potential co-signors. According to Roldan, he met with plaintiffs once in his office with respect to the potential purchase of the Berlin Drive property.

Whalen was arrested in April 2006 in connection with certain livestock transactions. After Roldan learned from television news that Whalen had been accused of "cattle rustling," Roldan contacted the district attorney because he was concerned he might be one of Whalen's victims.

Plaintiffs posted bail for Whalen so he could be released from jail. The premium for the bail bond was $20,000. They secured the bail bond with a $250,000 deed of trust on their house on April 27, 2006. After Whalen was released on bail, Roldan told Whalen that he wanted him to return his $25,000 and $35,000 investments They reached an oral agreement that the money had been loaned to Whalen as of April 30, 2006. Whalen also agreed with Roldan that he owed Roldan a total of $60,476, which included the money owed for the sheep sales transaction. Whalen did not sign a promissory note payable to Roldan.

According to Whalen, he sold some cattle to raise $60,000 and gave Roldan a certified check for $60,000 in October 2006, and therefore Roldan was paid in full as of November 2006. Whalen did not have a copy of the certified check because he gave it to

his criminal defense attorney. Roldan testified at Whalen's preliminary hearing on November 20, 2006, that he had been paid $60,000.[3]

During his trial testimony in the present case, Roldan explained that he had received a $60,000 "official check" but he did not cash it because Whalen had told him that plaintiffs needed the money for his bail and they were going to refinance their house to get the money to pay Whalen's debt. Roldan also explained that he returned the $60,000 "official check" to Whalen in December 2006 in exchange for a deed of trust recorded on plaintiffs' property. Whalen denied that Roldan had returned the $60,000 check to him.

Roldan understood that the deed of trust would encumber plaintiffs' property to secure Whalen's debt. Roldan did not loan any money to plaintiffs, did not prepare the deed of trust, and did not recall whether there was a promissory note associated with it. When the title company advised Roldan that the title company had the deed of trust, Roldan asked the title company to record the deed of trust in his name as an accommodation. Whalen testified that he did not know how the deed of trust was prepared, stating that "[i]t's a mystery to everybody."

The deed of trust encumbering plaintiffs' Ortega Circle property was signed by plaintiffs on March 12, 2007, before a notary. The deed of trust states that it was made on December 21, 2006, between plaintiffs as trustors and Roldan as beneficiary, and that it secures payment of $60,476 by plaintiffs to Roldan "according to the terms of a promissory note or notes of even date, with a maturity year of 2007." The notary testified that, as shown in the notary book, plaintiffs appeared before the notary at a UPS store on

[3] Whalen was ultimately convicted of multiple counts of grand theft arising from livestock transactions. On our own motion, we take judicial notice of this court's nonpublished opinion *People v. Whalen* (July 21, 2010, H034448), in which the judgment of conviction of five counts of grand theft (Pen. Code, §§ 484, 487, subd. (a)) and two counts of forgery (Pen. Code, § 470, subd. (d)) involving property valued at more than $150,000 was affirmed. (Evid. Code, § 452, subd. (d)(1).)

March 12, 2007, and were identified by their driver's licenses. Two documents were notarized, a "straight note"[4] and the subject deed of trust dated December 21, 2006. The notary charged a total of $40 for two signatures at $10 each on both documents. The deed of trust was recorded on March 22, 2007.

Plaintiffs admitted that their signatures are on the deed of trust, but denied that Whalen had asked them to sign it. Accord to plaintiffs, they have no recollection of signing the deed of trust or appearing before the notary, and they did not discover that the deed of trust was recorded on their property until November 2012, when they applied for a loan modification with Bank of America. The loan modification was refused due to the presence of the deed of trust.

C. *Motions to Reopen Evidence and Statement of Decision*

While closing arguments were being given at the end of the court trial, plaintiffs filed a motion "to reopen the presentation of rebuttal evidence." The motion was based upon evidence that plaintiffs asserted was newly discovered, consisting of the escrow records of First American Title Company purportedly showing that when plaintiffs refinanced their home loan in October 2006 the proceeds included payment of $60,000 to Roldan. Whalen stated that he found the escrow records after Loretta's trial testimony about plaintiffs' refinance of their Ortega Circle home. Roldan opposed plaintiffs' motion "to reopen the presentation of rebuttal evidence" and on May 22, 2014, the trial court denied the motion.

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[4] Regarding a "straight note," one commentator has stated: "Be aware that the titles placed at the top of various form promissory notes published by title insurance companies (e.g., 'straight note' or 'installment—interest included') can be *misleading*. [¶] It is the author's opinion, and the apparent consensus of the real estate bar, that such titles serve no useful purpose and, indeed, only create confusion. Promissory note titles used by title insurance companies have no legal definition; consequently, the better practice is to avoid incomplete or misleading titles and let the body of the note itself describe how interest and principal are to be paid." (Greenwald & Bank, Cal. Practice Guide: Real Property Transactions (The Rutter Group 2015) ¶ 6:191, pp. 6-50 – 6-51.)

The trial court filed a tentative statement of decision in June 2014 to which both parties filed objections. Plaintiffs filed a "renewed motion . . . to reopen presentation of impeachment rebuttal evidence" in August 2014, in which they argued that the records of First American Title Company regarding plaintiffs' October 2006 refinance of their Ortega Circle home should be admitted. Plaintiffs contended that the records constituted newly discovered evidence showing that the title company issued a check for $60,000 payable to Roldan that was paid on October 26, 2006. The trial court denied the renewed motion to reopen on September 29, 2014.

On October 15, 2014, the trial court filed its statement of decision, which included several findings: (1) plaintiffs' lack of memory regarding "the straight note, the Deed [of trust], or even appearing in the office of the notary public" would not "defeat the validity of the Deed of Trust or the straight note"; (2) there was evidence of a written promise to pay $60,476, consisting of the straight note referenced in the deed of trust as a promissory note and notarized by the notary; (3) the parties agreed that Whalen owed Roldan $60,476, which was the amount secured by the deed of trust; (4) the court accepted the testimony of Roldan that Whalen gave him a check in repayment of the debt that Roldan did not cash in exchange for the deed of trust securing the debt, since Whalen had no memory of the deed of trust or the promissory note; (5) the consideration for plaintiffs' guarantee of Whalen's debt, "if there was one, is the forbearance by [Roldan] to cash the check given to him in payment of the debt owed to him by Mr. Whalen"; (6) the failure to produce a guaranty or promissory note did not destroy the obligation to pay the debt secured by the deed of trust; and (7) "[t]he fact that the Deed of Trust referencing the amount in question, $60,476, made in favor of Sergio Roldan by the Plaintiffs after the date of the Preliminary Hearing on November 20, 2006 supports his testimony at trial that the check was returned uncashed to Mr. Whalen, leaving the debt outstanding, but secured by the Deed of Trust."

Based on these findings, the trial court ruled in favor of Roldan. The judgment entered on December 2, 2014, states: (1) "Plaintiffs' prayer for a declaration that the Deed of Trust is void and invalid is denied"; (2) "Plaintiffs' prayer for a judgment which will expunge the Deed of Trust nunc pro tunc is denied"; and (3) "Plaintiffs' prayer for a judgment quieting title and declaring that Plaintiffs are the owners in fee simple of the subject real property and that [Roldan] has no interest in the property adverse to Plaintiffs is denied." Plaintiffs filed a timely notice of appeal from the judgment.

Roldan filed a postjudgment motion for attorney's fees and and the trial court granted the motion in its February 27, 2015 order awarding Roldan attorney's fees of $43,119. The record does not include a notice of appeal from the attorney's fees order.

III. DISCUSSION

On appeal from the judgment, plaintiffs contend that the trial court erred in ruling in favor of Roldan because the evidence showed that the deed of trust is invalid for several reasons. Plaintiffs also contend that the trial court abused its discretion in denying their motions to reopen evidence and in sustaining Roldan's objection to the admission of Roldan's answer to form interrogatory question No. 50.2. Since the evidentiary issues are implicated in plaintiffs' appellate challenges to the validity of the deed of trust, we will begin by addressing the evidentiary issues.

A. *Evidentiary Error*

1. Motion to Reopen Evidence

Plaintiffs contend that the trial court abused its discretion in denying their first motion "to reopen the presentation of rebuttal evidence" and also in denying their renewed motion to reopen evidence. The evidence that plaintiffs asserted was newly discovered was the escrow records of First American Title Company. Plaintiffs maintain that the First American Title Company records would show that when plaintiffs refinanced their home loan in October 2006 the proceeds included payment of $60,000 to Roldan.

The documents attached to the first motion to reopen evidence, which was filed during closing arguments, include a borrower's estimated settlement statement for plaintiffs as buyers, dated October 12, 2006, which states that the disbursements to be paid include $60,000 due to Roldan; a disbursement summary report indicating that a check for $60,000 payable to Roldan issued October 18, 2006; and a copy of a screenshot from the title company's trust accounting program showing that the $60,000 check was paid on October 26, 2006. The records did not include a copy of the front or back of the $60,000 check that was paid. The trial court denied the first motion to reopen evidence on May 22, 2014.

After the trial court issued a tentative statement of decision, plaintiffs again sought admission of the First American Title Company records by filing their renewed motion "to reopen presentation of impeachment rebuttal evidence." During the hearing on the renewed motion to reopen evidence, the trial court denied the motion for the following reasons: "[T]he matter was set for this motion to reopen because I wanted to avoid any miscarriage of justice in case there was something to show that Mr. Roldan really did get this [$60,000] check. [¶] But even if the court did allow you to reopen, there would still be no evidence that the check was delivered to Mr. Roldan, or that Mr. Roldan cashed it. And without that, we remain in the same place we were at trial." The court also found it significant that the $60,000 check had cleared the bank in October 2006, well before plaintiffs signed the deed of trust securing a debt of $60,476 in March 2007. The trial court denied the renewed motion to reopen on September 29, 2014.

In their opening brief, plaintiffs contend that their motions to reopen evidence should have been granted because "[t]he new evidence consists of the realization that Roldan was paid with a title company check in October 2006 which cleared the bank a short week later. This would contradict Roldan's testimony that he gave this check to Whalen in March 2007 in return for the recorded deed of trust from [plaintiffs] and thus prove no debt."

Roldan disagrees, arguing that the trial court did not abuse its discretion in denying the motions to reopen evidence because plaintiffs were not diligent. He asserts that although several months passed between the denial of plaintiffs' first motion to reopen evidence in May 2014 and the denial of their renewed motion to reopen evidence in September 2014, plaintiffs failed to produce evidence that Roldan had received and cashed a disbursement check from plaintiffs' October 2006 refinance. Roldan additionally argues that the title company's evidence was insufficient to overcome the trial court's factual finding that Whalen's $60,476 debt remained outstanding and that is why plaintiffs signed the deed of trust securing the debt in March 2007.

Our review of the trial court's order denying a motion to reopen a case for further evidence is deferential. "A motion to reopen a case for further evidence can be granted only on a showing of good cause. [Citation.] Reopening is not a matter of a right but rests upon the sound discretion of the trial court. That discretion should not be overturned on appeal absent a clear showing of abuse. [Citations.]" (*Sanchez v. Bay General Hospital* (1981) 116 Cal.App.3d 776, 793.)

The trial court does not abuse its discretion in denying a motion to reopen a case for further evidence "where there has not been a sufficient showing of any excuse for not having produced the evidence at trial [citation], or where there is no showing of diligence. [Citation]." (*Estate of Horman* (1968) 265 Cal.App.2d 796, 807 (*Horman*).) Also, it is not an abuse of discretion to deny a motion to reopen a case for further evidence where the new evidence "will not produce a different result. [Citations.]" (*Broden v. Marin Humane Society* (1999) 70 Cal.App.4th 1212, 1222 (*Broden*).)

Here, the trial court determined that the First American Title Company documents that plaintiffs sought to have admitted by way of their motions to reopen evidence did not show that Roldan had actually received and cashed the $60,000 check that was disbursed in plaintiffs' October 2006 refinance. Absent such evidence, the trial court further determined that the title company documents did not conflict with Roldan's testimony

that Whalen's $60,476 debt remained unpaid and that was the reason that plaintiffs executed a deed of trust securing the $60,476 debt on their property in March 2007. The court therefore denied plaintiffs' motions to reopen evidence on the ground that the new evidence would not change the result. (See *Broden, supra,* 70 Cal.App.4th at p. 1222.)

The record also reflects that plaintiffs did not provide either an excuse for failing to produce the escrow records of First American Title Company at trial or a showing of diligence in attempting to timely produce these records. Although plaintiffs asserted that the records of First American Title Company were "newly discovered," it is undisputed that those records concerned plaintiffs' own refinance of their property in 2006. The existence of the First American Title Company escrow records was therefore within plaintiffs' knowledge. Plaintiffs made no showing as to why such evidence could not have been obtained from the title company long before the trial took place in 2014. (See *Horman,* 265 Cal.App.2d at p. 807.

On this record, we find that plaintiffs have not demonstrated that the trial court's decision to deny their motions to reopen evidence " 'exceeds the bounds of reason by being arbitrary, capricious or patently absurd. [Citation.]' " (See *People ex rel. Harris v. Black Hawk Tobacco, Inc.* (2011) 197 Cal.App.4th 1561, 1567.) We therefore determine that the trial court did not abuse its discretion in denying plaintiffs' first motion to reopen evidence and their renewed motion to reopen evidence.

2. Interrogatory Question No. 50.2

Plaintiffs contend that the trial court abused its discretion in sustaining Roldan's objection to form interrogatory No. 50.2 during Roldan's trial testimony, because "Roldan's answer to this form interrogatory went directly to his credibility because he testified at trial diametrically opposite [to] what he said in this written response."

The record includes the following trial testimony and the trial court's ruling on Roldan's objection regarding form interrogatory No. 50.2:

"[PLAINTIFFS' COUNSEL]: I'm at form interrogatory No. 50.2. [¶] 'Question: Was there a breach of any agreement alleged in the pleadings? If so, for each breach, describe and give the date of every act or omission that you claim is the breach of the agreement.' [¶] Do you have the question in mind?

"[ROLDAN]: I'm not understanding the number. [¶] . . . [¶]

"[PLAINTIFFS' COUNSEL]: . . . 'Is there any breach of an agreement? [¶] Answer: Yes. To the extent that Jeff Whalen has never paid the debt.' [¶] Do you see that answer?

"[ROLDAN]: Yes.

"[PLAINTIFFS' COUNSEL]: That was your answer?

"[ROLDAN'S COUNSEL]: Objection. This interrogatory was objected to because we have written documents and we have oral agreements. The written document being the deed of trust. [¶] . . . [¶]

"THE COURT: The objection is that it's vague and ambiguous and calls for a legal conclusion.

"[PLAINTIFFS' COUNSEL]: Your Honor must not be familiar with form interrogatories.

"THE COURT: All we have to do is turn your question around so that it doesn't call for a legal conclusion. [¶] . . . [¶]

"[PLAINTIFFS' COUNSEL]: Let me ask this, Mr. Roldan. Did you have an agreement with Mr. Whalen that we pay you a debt as of November 2006?

"[ROLDAN]: Verbal agreement, yes.

"[PLAINTIFFS' COUNSEL]: And did he breach that agreement by never paying the debt?

"[ROLDAN]: Well, he hasn't paid the debt, but I have the deed of trust securing that debt."

The applicable standard of review for an evidentiary ruling is well established. " '[A]n appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion.' [Citation.]" (*Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1078.) This court has explained that with respect to evidentiary rulings, "[d]iscretion is abused only when in its exercise, the trial court 'exceeds the bounds of reason, all of the circumstances before it being considered.' [Citation.] There must be a showing of a clear case of abuse and miscarriage of justice in order to warrant a reversal. [Citation]." (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281.) "In appeals challenging discretionary trial court rulings, it is the appellant's burden to establish an abuse of discretion. [Citations.]" (*Ibid*.)

We determine that plaintiffs have not met their burden to show that the trial court abused its discretion in sustaining Roldan's objection to form interrogatory question No. 50.2. According to the reporter's transcript of the trial testimony, Roldan was essentially consistent in both his written answer to form interrogatory No. 50.2 and his trial testimony. After Roldan's counsel objected to interrogatory No. 50.2, the trial court asked plaintiffs' counsel to rephrase the question. Counsel did so, and obtained what appears to be the same answer given by Roldan in response to form interrogatory No. 50.2: that Whalen had breached their agreement that he would pay his debt to Roldan. Accordingly, we determine that plaintiffs have not shown that the trial court abused its discretion in sustaining Roldan's objection to form interrogatory No. 50.2.

For these reasons, we determine that the judgment may not be reversed on the ground of evidentiary error.

B. *Cancellation of Deed of Trust*

We will begin our evaluation of plaintiffs' contentions regarding the validity of the deed of trust with the standard of review that applies to a judgment based on a statement of decision following a bench trial.

1. Standard of Review

In conducting our appellate review, we presume that a judgment or order of a lower court is correct. The general rule is that " '[a]ll intendments and presumptions are indulged to support [the judgment] on matters as to which the record is silent, and error must be affirmatively shown.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; accord, *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.)

Accordingly, " 'in reviewing a judgment based upon a statement of decision following a bench trial, "any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision. [Citations.]" [Citation.] In a substantial evidence challenge to a judgment, the appellate court will "consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.]" [Citation.] We may not reweigh the evidence and are bound by the trial court's credibility determinations. [Citations.] Moreover, findings of fact are liberally construed to support the judgment. [Citation.]' [Citation.]" (*Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 765 (*Cuiellette*).)

The substantial evidence standard of review applies to both the express and implied findings of fact made by the trial court in its statement of decision following a bench trial. *(SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 462.) "The doctrine of implied findings is based on our Supreme Court's statutory construction of section 634 and provides that a 'party must state any objection to the statement in order to avoid an implied finding on appeal in favor of the prevailing party. . . . [I]f a party does not bring such deficiencies to the trial court's attention, that party waives the right to claim on appeal that the statement was deficient . . . and hence the appellate court will imply findings to support the judgment.' [Citation.]" (*Ibid*.)

2. Contentions on Appeal

Plaintiffs contend that the trial court should have ruled that the deed of trust on their Ortega Circle property is invalid because (1) there was no evidence of a written guaranty showing that plaintiffs agreed to guarantee Whalen's $60,476 debt to Roldan; (2) there is no substantial evidence that Roldan returned an uncashed check to Whalen in light of the evidence showing that the $60,000 disbursement check issued to Roldan in plaintiffs' October 2006 refinance "cleared the bank" a few days later; (3) there is no substantial evidence that a promissory note was delivered to Roldan; and (4) there is no evidence of an outstanding debt owed by Whalen to Roldan in light of the evidence showing that the $60,000 check that was issued to Roldan in plaintiffs' October 2006 refinance "cleared the bank" a few days later. We will discuss each of plaintiffs' contentions in turn.

Evidence of Guaranty

Plaintiffs argue that the deed of trust securing a debt of $60,476 on their property is invalid because there was no evidence of a written guaranty showing that plaintiffs agreed to guarantee Whalen's debt of $60,476 to Roldan.

Roldan acknowledges that the statute of frauds, as set forth in Civil Code section 1624, subdivision (a)(2), provides that "[t]he following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent: [¶] . . . [¶] A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in Section 2794." Roldan argues that the requirement of a writing does not apply, where, as here, the promise to answer for the debt of another was made directly to the debtor. We agree.

The California Supreme Court has ruled that "there is not a contract to answer for the debt of another within the statute of frauds where the alleged guarantor promises the *debtor*, rather than the creditor to pay the former's debt. [Citations.]" (*King v. Smith*

(1948) 33 Cal.2d 71, 74; see also *20th Century Cigarette Vendors v. Shaheen* (1966) 241 Cal.App.2d 391, 395 [statute of frauds inapplicable where the promise to pay the note was made to the debtor].)

In this case, Roldan testified that in December 2006 he returned to Whalen the $60,000 "official check" that Whalen had given him in exchange for a deed of trust recorded on plaintiffs' property, as follows: "[Whalen] was going to resolve all his problems and then he was going to pay me with [plaintiffs] re-financing their house or they're having a deed of trust on [his] parents' property." Regarding Whalen's debt to him, Roldan also testified that "[e]verything was done between me and [Whalen]. I never deal with [plaintiffs] for anything."

Applying the applicable standard of review, we determine that Roldan's testimony constitutes substantial evidence that plaintiffs made a promise to Whalen to pay his $60,476 debt to Roldan by refinancing their house. We emphasize that we are required to consider all of the evidence in the light most favorable to Roldan, since he is the prevailing party, giving him the benefit of every reasonable inference and resolving any evidentiary conflicts in support of the judgment. We do not reweigh the evidence and are bound by the trial court's credibility determinations. (See *Cuiellette, supra,* 194 Cal.App.4th at p. 765.) Here, the trial court accepted Roldan's testimony as most credible. Moreover, it may be reasonably inferred that plaintiffs made their promise to pay that debt directly to Whalen, the debtor, from the evidence showing that (1) Whalen informed Roldan that plaintiffs were going to refinance their house to pay Whalen's $60,476 debt to Roldan; and (2) the lack of any contact between Roldan and plaintiffs regarding Whalen's debt.

Accordingly, we are not convinced by plaintiffs' argument that the lack of a written guaranty is sufficient to invalidate the subject deed of trust.

Return of Uncashed Check

Plaintiffs contend that there is no substantial evidence that Roldan returned an uncashed check to Whalen in light of the evidence showing that the $60,000 disbursement check issued to Roldan in plaintiffs' October 2006 refinance "cleared the bank" a few days later.

In the statement of decision, the trial court ruled as follows regarding Roldan's return of a check to Whalen: "Mr. Whalen gave [Roldan] a certified, cashiers, or official check in repayment of the debt he owed. [Roldan] testified he did receive a check as payment on the debt. He also testified Mr. Whalen asked him not to cash the check because he was in need of the money. [Roldan] testified he agreed not to cash the check in exchange for the Deed of Trust securing the debt; and therefore returned the check, uncashed to Mr. Whalen. [¶] . . . [¶] Mr. Whalen disagreed and stated the check was cashed and never returned to him. Between the two, the Court accepts the testimony of Mr. Roldan as Mr. Whalen has no memory of the Deed of Trust, the promissory or straight note, or any activity related to those items."

The trial court also determined that the evidence that "the Deed of Trust referencing the amount in question, $60,476, made in favor of Sergio Roldan by the Plaintiffs after the date of the Preliminary Hearing on November 20, 2006 [where Roldan testified he had been paid] supports his testimony at trial that the check was returned uncashed to Mr. Whalen, leaving the debt outstanding, but secured by the Deed of Trust."

Plaintiffs argue that there is no substantial evidence to support the trial court's "absurd 'finding' " because the First American Title Company records of plaintiffs' October 2006 refinance clearly show that Roldan was paid in full by the $60,000 disbursement check that "cleared the bank within days of its issuance."

We are not convinced by plaintiffs' argument because, as we have discussed, the trial court did not abuse its discretion in denying plaintiffs' motions to reopen evidence and admit the First American Title Company records into evidence. Therefore, the title

company evidence was not before the trial court and the court properly did not consider the title company evidence in making its rulings.

In addition, we reiterate that our standard of review does not permit us to determine the credibility of witnesses. (See *Cuiellette*, *supra*, 194 Cal.App.4th at p. 765.) The trial court found credible Roldan's testimony that he returned the check uncashed to Whalen, and we are bound by that credibility finding. We therefore find no merit in plaintiffs' contention that the deed of trust is invalid because Roldan did not return an uncashed $60,000 check to Whalen.

Delivery of Promissory Note

Plaintiffs contend that the deed of trust securing a $60,476 debt on their property is invalid because there is no substantial evidence that a promissory note was delivered to Roldan. As support for this contention, plaintiffs rely on Civil Code section 1626, which provides: "A contract in writing takes effect upon its delivery to the party in whose favor it is made, or to his agent." Plaintiffs also assert that the trial court "conspicuously refused to address the principal controverted issue of fact of *non-delivery* of the purported promissory note mentioned in the obligations clause of the deed of trust."

Regarding the promissory note, the trial court found that "there is a written document. It is referred to as a straight note by the notary and as a promissory note in the Deed of Trust. Neither side has produced this note for reasons unknown to the Court. Defendant Roldan testified that he does not remember if there was a note, if he ever had a note, and that he cannot find one now."

The trial court further found that the deed of trust contained, in part, the following language regarding the promissory note: " 'For the Purpose of Securing (1) payment of the sum of $60,476.00 with interest thereon according to the terms of a promissory note or notes of even date, with a maturity year of 2007 herewith made by Trustor, payable to order of Beneficiary. . . .' "

We agree with plaintiffs that the trial court did not make an express finding regarding delivery of the promissory note. However, that does not end our inquiry into the merits of plaintiffs' contention that lack of delivery of the promissory note invalidates the subject deed of trust. Even assuming for the sake of argument that the promissory note underlying the subject deed of trust was not delivered to Roldan, we are not convinced by plaintiffs' argument.

Although plaintiffs rely on the delivery rule provided by Civil Code section 1626 to support their contention, they have provided no authority for the proposition that Civil Code section 1626 applies to invalidate a deed of trust where, as here, the trial court has found that the debt secured by the deed of trust remains outstanding.

Further, we find significant the general rule that "[a] trust deed may be given as security for an indebtedness whether represented by a note or not. [Citations.]" (*Dool v. First National Bank* (1930) 107 Cal.App. 585, 588.) Therefore, "[a] mortgage or deed of trust secures the debt and not the note which evidences it. [Citations.] A trustor may make his [or her] property interest primarily liable for the debt without ever having signed a note. [Citation.]" (*Matthews v. Hinton* (1965) 234 Cal.App.2d 736, 741-742.)

Under these rules, a promissory note was not required to secure Whalen's debt by a deed of trust on plaintiffs' property. For that reason, we find no merit in plaintiffs' contention that the deed of trust is invalid due to lack of delivery of a promissory note to Roldan.

Evidence of an Outstanding Debt

Plaintiffs contend that there is no substantial evidence that Whalen's $60,476 debt owed to Roldan remains outstanding, because Roldan admitted in his November 2006 preliminary hearing testimony that he had been paid $60,000, and because the First American Title Company records show that a $60,000 disbursement check payable to Roldan was cashed in October 2006.

Our evaluation of plaintiffs' contentions is again governed by the applicable standard of review. " 'In a substantial evidence challenge to a judgment, the appellate court will "consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.]" [Citation.] We may not reweigh the evidence and are bound by the trial court's credibility determinations. [Citations.] Moreover, findings of fact are liberally construed to support the judgment. [Citation.]' [Citation.]" (*Cuiellette, supra*, 194 Cal.App.4th at p. 765.)

Here, the trial court found that "[t]he fact that the Deed of Trust referencing the amount in question, $60,476, made in favor of Sergio Roldan by the Plaintiffs after the date of the Preliminary Hearing on November 20, 2006 supports his testimony at trial that the check was returned uncashed to Mr. Whalen, leaving the debt outstanding, but secured by the Deed of Trust." We may not reweigh the evidence regarding whether Whalen's debt to Roldan was outstanding, and we are bound by the trial court's determination that Roldan's testimony that he returned the $60,000 check uncashed was credible.

Further, as we have discussed, the trial court did not abuse its discretion in denying plaintiffs' motions to reopen evidence and admit the First American Title Company records of plaintiffs' October 2006 refinance into evidence. The title company records regarding the October 2006 disbursement check in the amount of $60,000 were therefore not before the trial court, and the court properly did not consider those records in making its findings. We therefore find no merit in plaintiffs' substantial evidence challenge to the trial court's finding that Whalen's $60,476 debt remained outstanding.

Having determined that none of plaintiffs' appellate challenges to the validity of the subject deed of trust have merit, we further determine that the trial court did not err in entering a judgment that denied plaintiffs' prayer for a declaration that the deed of trust is

void and invalid and also denied plaintiffs' prayer for a judgment expunging the deed of trust nunc pro tunc.

C. *Quiet Title*

The judgment entered by the trial court also denied plaintiffs' prayer for a judgment quieting title and declaring that plaintiffs are the owners in fee simple of "the subject real property" and Roldan has no adverse interest in the property. Since plaintiffs seek reversal of the judgment in its entirety, we will address this portion of the judgment although plaintiffs have not provided an express appellate challenge to the quiet title ruling.

"Actions to quiet title proceed under chapter 4 of title 10 of part 2 of the Code of Civil Procedure. Code of Civil Procedure section 760.020, subdivision (a) permits a party to bring an action 'to establish title against adverse claims' to real property. The plaintiff is to file a verified complaint, which includes, among other things, '[t]he adverse claims to the title of the plaintiff against which a determination is sought.' (Code Civ. Proc., § 761.020, subd. (c).) The plaintiff 'shall' name as defendants 'the persons having adverse claims that are of record or known to the plaintiff or reasonably apparent from an inspection of the property.' (Code Civ. Proc., § 762.060, subd. (b).) . . . [¶] Any person who has a claim to the property may appear as a defendant, whether or not they are named in the complaint. (Code Civ. Proc., § 762.050.) The court is then required to 'examine into and determine the plaintiff's title against the claims of all the defendants.' (Code Civ. Proc., § 764.010.)" (*Deutsche Bank National Trust Co. v. McGurk* (2012) 206 Cal.App.4th 201, 210-211.)

In this case, the record reflects that the trial court determined that Roldan's adverse claim, consisting of deed of trust securing a debt of $60,476 on plaintiffs' Ortega Circle property, was valid. The trial court therefore declined to establish title in plaintiffs against Roldan's adverse claim. Having found no merit in plaintiffs' appellate challenges to the validity of the deed of trust, we also find no merit in plaintiffs' implicit appellate

challenge to the portion of the judgment denying their prayer for a judgment quieting title.

D. ***Attorney's Fees Order***

Although plaintiffs provide no express argument regarding attorney's fees in their appellate briefs, they request reversal of the February 27, 2015 postjudgment order awarding Roldan attorney's fees of $43,119. We determine that the issue of attorney's fees is not cognizable on appeal.

"A notice of appeal from a judgment alone does not encompass other judgments and separately appealable orders: ' "The law of this state does not allow, on an appeal from a judgment, a review of any decision or order from which an appeal might previously have been taken." ' [Citation.]" (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 239 (*Sole Energy*).) Thus, " '[d]espite the rule favoring liberal interpretation of notices of appeal, a notice of appeal will not be considered adequate if it completely omits any reference to the judgment being appealed.' [Citation.]" (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 47.)

Thus, "[a]n order awarding attorneys' fees, if made after judgment, is separately appealable. ([Citation]; see Code Civ. Proc., § 904.1, subd. (a)(2).) '[W]here several judgments and/or orders occurring close in time are separately appealable (e.g., judgment and order awarding attorney fees), each appealable judgment and order must be expressly specified—in either a single notice of appeal or multiple notices of appeal—in order to be reviewable on appeal.' [Citation.]" (*DeZerega v. Meggs* (2000) 83 Cal.App.4th 28, 43.)

In this case, plaintiffs' notice of appeal specified that they were appealing from the December 2, 2014 judgment. No other order was mentioned. Since the February 27, 2015 order awarding Roldan attorney's fees of $43,119 was separately appealable, in the absence of a notice of appeal from that order we lack jurisdiction to review it. (See *Sole Energy*, *supra*, 128 Cal.App.4th at pp. 239-240.)

IV. DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.

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